80-2210

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DR. GERALD E. McCABE,

Petitioner,

vs.

DEPARTMENT OF REGISTRATION AND EDUCATION OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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QUESTIONS PRESENTED

1. Whether the Fifth and Fourteenth Amendment rights under the United States Constitution of a physician in a state medical license revocation proceedings were violated when counsel for the prosecution and members of the disciplinary board repeatedly commented on the physician's refusal to testify, especially where such testimony would have infringed the confidentiality of the physician-patient relationship between the physician and his patients?

2. Whether the state's revocation of a physician's license because of his silence in a civil, albeit "quasi-criminal" proceeding, was too "costly" a penalty for his constitutional rights to remain silent?

3. Whether the physician's right to due process was violated in failing to accord him a "full, fair and impartial hearing," and in other ways was insufficient to shock the conscience of a reviewing court?

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NO.

DR. GERALD E. McCABE,

Petitioner,

VS.

DEPARTMENT OF REGISTRATION AND EDUCATION OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

REFERENCE TO REPORTS

The opinion of the Appellate Court of Illinois, First District, is reported in 90 Ill. App. 3rd. 1123, 413 N.E. 2d 1353 (November, 1980) and is appended hereto at pages App. 1 through App. 14. The order of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal appears at page App. 15.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, Third Division was entered on November 26, 1980. Petitioner's timely Petition For Leave To Appeal was denied by the Supreme Court of Illinois on March 30, 1981. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC, §1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929, as amended, 28 U.S.C. § 1257(3)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATUTES INVOLVED

Ill. Rev. Stats., 1977, ch. 111, par. 4433

4433. *Certificates of registration—Application—Examinations*

§ 16. The Department may revoke, suspend, place on probationary status, or take any other disciplinary action as the Department may deem proper with regard to the license, certificate or state hospital permit of any person issued under this Act or under any other Act in this State to practice medicine, to practice

the treatment of human ailments in any manner or to practice midwifery, or may refuse to grant a license, certificate or state hospital permit under this Act or may grant a license, certificate or state hospital permit on a probationary status subject to the limitations of the probation, and may cause any license or certificate which has been the subject of formal disciplinary procedure to be marked accordingly on the records of any county clerk upon any of the following grounds:

. . .

(4) Engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public;

. . .

(19) The use or prescription for use of narcotics or controlled substances (designated products) in any way other than for therapeutic purposes.

STATEMENT OF FACTS

This was a disciplinary action brought by the Illinois Department of Registration and Education (hereafter "Department") to revoke the medical license of petitioner, Dr. Gerald E. McCabe. The Department filed a complaint with the Medical Disciplinary Board (hereafter "Board") alleging that the physician had written an "inordinate amount" of prescriptions for "controlled substances" in a certain time period and that the prescriptions were for "non-therapeutic" purposes.

During the proceedings before the Board, the Department offered into evidence some 7,208 prescription forms purportedly written by Dr. McCabe. Over his objections as to lack of foundation and identification, the Board admitted into evidence a huge mass of unauthenticated and unidentified documents, of which only 253 were allegedly issued by Dr. McCabe as prescriptions for non-therapeutic purposes. None of the patients were produced as witnesses.

The only "proof" as to the "non-therapeutic" charge was the testimony of an assistant professor of psychiatry, claiming that he was a consultant for the National Institute of Drug Abuse, tendered as an expert, who stated that the prescriptions he had examined were "non-therapeutic". The witness acknowledged however, that he made that judgment without having ever seen or examined any of the patients for whom the prescriptions were written, had not seen or studied their medical histories and had not determined, and did not know the particular medical needs of the patients in question.

In an effort to link the 7,208 prescriptions to the physician, a handwriting expert from the Federal Bureau of Investigation examined samples of the physician's handwriting, but testified that he "could not identify the writer" of the prescriptions.

Lacking testimony of the patients for whom the prescriptions were written, or their medical records or histories, the Department repeatedly called upon the physician to testify against himself. Petitioner invoked his rights to remain silent under the Fifth and Fourteenth Amendments to the Federal Constitution and, additionally, because his testimony would have breached the confidentiality of his relationship to his patients.

Notwithstanding the physician's invocation of the Fifth and Fourteenth Amendments, Counsel for the Department and Members of the Board, repeatedly commented on the petitioner's refusal to testify. The record shows that the Board bluntly stated that it would take the physician's refusal to testify into consideration in its final determination.

Petitioner's medical license was ordered revoked. On administrative review in the state circuit court, the circuit

judge acknowledged that: "The record reflects indeed, many technical errors" (Tr. 38-39). The Court, however, confirmed the decision of the Medical Disciplinary Board. The Appellate Court affirmed the judgment of the Circuit Court. The Supreme Court of Illinois denied the Petition for Leave to Appeal.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted his position on the federal claims and the infringement of his constitutional rights at every level of the Illinois court system: He did so before the Medical Disciplinary Board; he preserved his claimed error on administrative review to the Illinois Circuit Court; on his appeal to the Illinois Appellate Court, and in his Petition For Leave To Appeal to the Illinois Supreme Court. That petition was denied on March 30, 1981. Thus, the Appellate Court of Illinois, First District, is the "highest court in [the] State in which decision could be had." 28 USC, §1257.

ARGUMENT

This Court has held that a proceeding which may result in the revocation of a professional's license is quasi-criminal in nature. It therefore is attended by all the protections of the Fifth and Fourteenth Amendments to the Constitution. The court has also held that the right to remain silent may not be infringed by imposing a penalty for the silence because the imposition of any sanction makes the assertion of the privilege too exorbitant. *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) ("There are rights of constitutional stature whose exercise a State may not condition *by the extraction of a price* . . .") (p. 500) (Emphasis added).

The prohibition against imposition of a "penalty" for the exercise of a Fifth Amendment privilege also forbids any adverse comment against petitioner herein for exercising his privilege. *Spevack* v. *Klein*, supra, at p. 550.

For as this Court said in *Spevack*, supra, the Fifth Amendment:

> ". . . forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt." (385 U.S. at 550).

The Court went on to state:

> "The threat . . . loss of professional standing, professional reputation and livelihood are powerful forms of compulsion to make a lawyer [substitute doctor] relinquish the privilege." (*ibid* at 556).

Even if the proceedings in which the Fifth/Fourteenth Amendment privilege is invoked, are not criminal in na-

ture, the defendant may not be "compelled" to give testimony which might lead to subsequent criminal prosecution arising from the testimony. Absent a "use immunity" the licensee is entitled to raise the Fifth/Fourteenth Amendment privilege without the "imposition of any sanction which makes the assertion of the [privilege] 'costly' ". *Malloy* v. *Hogan,* supra, 378 U.S. 1 at 8; *In re March,* 78 Ill. 2d 382 (1978).

The opinion of the Illinois Appellate Court skirts and avoids the constitutional questions squarely raised. It refers to the Illinois case *In re March,* supra, where the attorney-respondent had been granted use immunity and therefore, was estopped from asserting his Fifth/Fourteenth Amendment rights. In the instant case no use immunity was asked for, nor granted to Dr. McCabe. In the circumstances he had an unfettered right to remain silent.

In the case at bar the Department's counsel repeatedly (dozens of times) sought to propound questions to Dr. McCabe of an inflammatory nature, even though the physician made it clear that he would not answer the questions because of his claim of the Fifth/Fourteenth Amendment privilege. Notwithstanding, the repeated strictures of this Court that the exercise of the privilege should not raise any presumption against a defendant nor provoke unfavorable comment, the Illinois Medical Disciplinary Board bluntly stated that it would take into consideration Dr. McCabe's refusal to testify, and did so in revoking his license. (Tr. 866)

An additional dimension to the violation of petitioner's rights was his duty to protect the confidentiality of the physician-patient relationship. Not only did the Illinois Medical Disciplinary Board attempt to exact a price for

Dr. McCabe's exercise of his Fifth/Fourteenth Amendment privilege, but it also misinterpreted his silence. To require him to testify concerning the medical needs of his patients without their consent would have been a flagrant violation of the physician-patient relationship.

Because the Medical Disciplinary Board could not produce those patients, nor their medical records, there was a fatal deficiency of the proof of the charges that the drugs allegedly prescribed by Dr. McCabe were for "non-therapeutic" purposes, or that the number of such prescriptions were "inordinate".

Petitioner's right to due process was violated in other ways sufficient to shock the conscience of a reviewing court:

1. The medical sophistication of the Illinois Medical Disciplinary Board, supposedly composed of a body of experts, was not sufficient to support its finding because of the wholly unsatisfactory nature of the independent testimony offered. The universal rule is that an administrative board cannot rely on its own "expertise" but must be guided by expert medical testimony in order to reach a decision. *Farny* v. *Anderson,* 56 Ill. App. 3d 677; *Scott* v. *Texas State Board of Medical Examiners,* 384 SW 2d 686 S. Ct. (Tex. 1964) ("But there was no evidence offered by the Board *from experts in the field of medicine,* and in the use of narcotic drugs, to establish that Scott was not acting in good medical faith; *or that the prescriptions were not issued in response to medical needs.*") (384 SW 2d at p. 691) (Emphasis added).

2. A series of 15 evidentiary hearings were conducted by the Illinois Board which was comprised of seven members. At some of the hearings only two of

a statutory forum of four were present. At other hearings there was no consistency in the composition of the quorums. In reaching the Board's decision, some members who were absent during some of the evidentiary hearings voted without having read the transcript or reviewing the exhibits.

3. Neither the patients nor their medical records were examined and evidence of their particular medical needs were never made part of the Department's foundation proof for the opinion of its "expert".

4. The "adding" machine approach of the Department's purported expert that the *mere volume* of prescriptions were "excessive for a *hypothetical average patient*" [sic] was prejudicial, improper and injected a fictitious standard not recognized by Illinois law or in any other jurisdiction.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

Third Division — Filed 11-26-80

OPINION OF THE APPELLATE COURT

No. 79-573

DR. GERALD E. McCABE,

Plaintiff-Appellant,

v.

DEPARTMENT OF REGISTRATION AND EDUCATION OF THE STATE OF ILLINOIS,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County.

Honorable *Richard L. Curry* presiding

MR. JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, Dr. Gerald E. McCabe, filed an action in the circuit court of Cook County for administrative review seeking to set aside the decision of the Medical Disciplinary Board which had ordered plaintiff's medical license revoked. The trial court affirmed the Board's decision and plaintiff appeals.

On July 28, 1976, defendant, Department of Registration and Education of the State of Illinois, petitioned for a temporary suspension of plaintiff's medical license pending a hearing before the Board. On July 29, 1976, the Department's Chief Regulatory Officer presented evidence

ex parte to the Director of the Department to indicate that plaintiff's practice of medicine constituted an immediate danger to the public. The Director temporarily suspended plaintiff's license and scheduled a full hearing before the Board on the Department's complaint against plaintiff.

The Department's thirteen-count complaint alleged in pertinent part that plaintiff was a duly licensed osteopathic physician and that during the first half of 1976, he had issued 7,208 prescriptions for various controlled substances; and that the number of prescriptions issued was inordinately large and excessive for the number of patients for whom the prescriptions were issued. The complaint further charged that plaintiff had issued 175 prescriptions on a single day, May 14, 1976. It also stated that plaintiff did not issue the prescriptions for legitimate therapeutic purposes; that he issued prescriptions for controlled substances for purposes of maintaining patient addictions and illegal distribution; and that such acts by plaintiff constituted grounds for revocation of plaintiff's medical license, all in violation of sections 16(4) and 16(19) of the Medical Practice Act. (Ill. Rev. Stat. 1977, ch. 111, pars. 4433(4) and 4433(19).) The Board denied plaintiff's motion to dismiss the complaint.

The hearing was conducted and testimony was heard on fifteen separate occasions before a Medical Disciplinary Board consisting of seven physicians. On nine of these occasions, less than a quorum of the Board was present.

At the hearing, the Department sought to call Tony Marcantante as a witness. He was a patient of plaintiff and had received a number of prescriptions for controlled substances from plaintiff. Marcantante's counsel appeared on his behalf and disputed the validity of a subpoena re-

quiring his client's presence. Counsel stated that if Marcantante were compelled to appear, he would assert his fifth amendment privilege not to testify. When plaintiff was called as an adverse witness by the Department, he also asserted his fifth amendment right not to testify. Three members of the Board expressed disappointment over plaintiff's refusal to testify and one of the members stated that the Board would take into consideration his refusal to testify.

Lawrence B. Slotnik, drug compliance coordinator for the Department, testified that he directed a Mr. Shawn, a Department investigator, to serve a subpoena on Irving Cotovsky, owner of two pharmacies, for all prescriptions filled at the pharmacies between November 1, 1975 and June 1, 1976. He identified the Department's group exhibit as being the prescriptions obtained from the pharmacies by Shawn pursuant to subpoena. Slotnick testified that after making a study of the prescriptions, he turned them over to Dr. John Fultz, the Department's Medical Coordinator.

Dr. Fultz testified that he had reviewed all of the prescriptions contained in the Department's group exhibit. All bore plaintiff's name and address and a signature which usually read "G. McCabe." Fultz testified that the BND number assigned to plaintiff appeared on each of the prescriptions. He explained that a BND number is the number of a practitioner's license to prescribe controlled substances. There were approximately 7,200 prescriptions.

Doris Fischer, a data processor for the Illinois Bureau of Investigation, testified for the Department that she maintained detailed records of all state triplicate prescriptions blanks for designated controlled substances which were requested by and sent to physicians. She reviewed

all 7,208 controlled substance prescriptions contained in the Department's exhibit and stated that 3,142 were written on these triplicate state prescription forms. Such forms are specially ordered by and issued to the physicians in numerical sequence, thereby providing a system of accountability. Fischer compared her records with the prescription forms and concluded that all 3,142 prescription forms had been requested by and sent to plaintiff. On two occasions plaintiff called the witness to inform her that he had not received the triplicate forms. In each case, he called back a few days later to say that the forms had arrived. Fischer had never received any notification from plaintiff that any of the specially ordered prescription forms had been lost or stolen.

Luther Senter, a handwriting expert for the Federal Bureau of Investigation, testified for the Department that he had analyzed 5,944 of the 7,208 controlled substance prescriptions. Due to time constraints he was unable to analyze the remaining prescription forms. Senter also had examined handwriting of plaintiff; the handwriting lacked identifying characteristics and the comparison was inconclusive. Senter stated, however, that in 2,897 prescriptions the handwriting in both the body of the prescription and the signature was within the range of plaintiff's writing ability. As to the remaining 3,047 prescriptions, the handwriting in the body of the form was inconsistent with plaintiff's ability but the signature was consistent with plaintiff's handwriting ability.

Dr. William E. Thornton, a physician and psychiatrist, was called as a witness by the Department. He testified that he was a consultant for the National Institute of Drug Abuse and had been medical director for the Illinois Drug Abuse Programs. He also was an associate professor of psychiatry at the University of Illinois School of Medi-

cine. He testifieed that he had published approximately three dozen times on topics concerning substance abuse.

Dr. Thornton testified as to the nature, use, characteristics and normal therapeutic dosage ranges for controlled substances prescribed by plaintiff, including the drugs dilaudid, preludin, morphine sulfate (heroin) and ritalin. He also testified as to factors altering maximum dosage limits. Those factors included such matters as the interaction of the controlled substance with other drugs, a patient's tolerance, effects of addiction or long term use, and oral or intravenous methods of administration. Dr. Thornton then examined the prescriptions for certain controlled substances given to particular patients for plaintiff from May 14, 1976 to June 1, 1976. He concluded that in the case of Gerald Berkowitz, the amounts of dilaudid prescribed far exceeded normal dosage ranges for all individuals except addicts. The amounts prescribed for Berkowitz would be fatal to most non-addicted individuals.

Dr. Thornton also reviewed the prescriptions issued by plaintiff to Alfred Glenn. The prescriptions were for various amounts of morphine sulfate, preludin and ritalin. The amounts of morphine sulfate prescribed were grossly outside the normal dosage range for a non-addicted individual, and Dr. Thornton knew of no medical reason for the great amount prescribed. Dr. Thornton noted that the morphine sulfate and ritalin prescriptions for Glenn were often issued on the same day. There was no apparent pattern for issuing prescriptions to Glenn or indications that the dosages were being progressively reduced.

Dr. Thornton then reviewed the prescriptions issued to Marcantante for morphine sulfate. He testified that the dosage and frequency of the prescriptions would be potentially lethal and excessive to an individual not addicted to the drug and concluded that the prescriptions given

also would be inconsistent with detoxification or an addiction maintenance program. Dr. Thornton was aware of no drug abuse program which would utilize the large quantities prescribed for Marcantante. He stated that the amounts of morphine sulfate prescribed would be excessive even for an individual addicted to the drug.

Dr. Thornton next examined the prescriptions issued to Margaret Gonzales for dilaudid, morphine sulfate and preludin. The dilaudid prescriptions were excessive for a non-addicted individual, and there was no therapeutic purpose for issuing prescriptions of preludin and dilaudid together.

Dr. Thornton also reviewed the prescriptions given to Glenn Baker for morphine sulfate. He noted several instances in which more than one prescription for morphine sulfate was issued to Baker on the same day. The witness knew of no therapeutic purpose for prescribing such amounts of morphine sulfate to either a non-addicted or addicted individual.

In a similar manner, Dr. Thornton reviewed the prescriptions of several other patients of plaintiff, including the prescriptions for Marty Kaprelian, Ken Kosyuba, John Lawlor, Pat Davies and Laura Dukes. In each instance, he concluded that the amounts of controlled substances prescribed were excessive for non-addicted individuals. Dr. Thornton knew of no therapeutic purpose for issuing this number of prescriptions, regardless of whether the individual was addicted or non-addicted.

During a vigorous and detailed cross-examination, Dr. Thornton acknowledged that some of the three dozen publications he claimed had been accepted for publication had not yet appeared publicly, while some of them consisted of letters to editors. He had never personally examined

plaintiff's patients or reviewed any of their medical histories. These were necessary prerequisites to recommending treatment. Dr. Thornton repeated his opinion that there was no therapeutic purpose for the amount of drugs prescribed by plaintiff. He was aware that a text on which he placed some reliance disagreed with some of his conclusions about how much morphine sulfate an individual could absorb without ill-effect.

After the Department rested, plaintiff submitted a transcript of testimony from an earlier hearing before the Board of Pharmacy. The Board of Pharmacy had conducted a hearing to decide whether the pharmacy licenses of Irving Cotovsky should be revoked. The issue in that case was whether the filling of plaintiff's 7,208 prescriptions constituted grounds for revocation of the pharmacy licenses. Dr. Norman Farnsworth and Dr. Phillippe Benoit, both professors in the University of Illinois Medical Center Department of Pharmacology, had testified for the pharmacist, and it was the transcript of their testimony in that proceeding which plaintiff offered in evidence.

Dr. Farnsworth had stated that in evaluating the therapeutics of various drug dosages, several factors such as age, sex, weight, method of administration and patient tolerance should be considered. He noted that an individual's tolerance for morphine drugs increases with extensive use. He concluded that the amounts prescribed by plaintiff were not necessarily lethal and that, as a pharmacist, he would have filled the prescriptions. The prescriptions were unusual, and the witness would have talked to plaintiff before filling the prescriptions.

Dr. Benoit had stated that he examined the prescriptions for morphine sulfate issued to plaintiff's patients and stated that, as a pharmacist, after contacting the physi-

cian, he would have filled the prescriptions. He noted that renal colic, a condition for which certain prescriptions were written, causes severe abdominal pain, and that the amount of morphine sulfate required to alleviate that pain might not exceed the amount prescribed for Glenn Baker. He was aware of recorded instances of patients receiving drug dosages which exceeded the amounts prescribed by plaintiff. Dr. Benoit stated that combining preludin and morphine sulfate was not improper as such combinations could reduce undesired side effects of narcotics.

At the conclusion of the hearing, the Board took the matter under advisement. After reviewing the transcript of the proceedings, the Board found that plaintiff's method of prescribing controlled substances was unethical and harmful to the public, and that plaintiff had issued prescriptions for controlled substances for other than therapeutic purposes. The Board recommended that plaintiff's license to practice medicine be revoked. After a denial of plaintiff's motion for a rehearing, the Director ordered plaintiff's license revoked.

We initially shall consider plaintiff's various claims that he was denied a fair and impartial hearing by the Board.

Plaintiff maintains that the failure of the Board to have a quorum present during each instance in which testimony was heard deprived him of a fair hearing. Due process safeguards and protections apply to medical license revocation proceedings. (*Stojanoff v. Department of Registration & Education* (1979), 72 Ill. App.3d 584, 391 N.E.2d 10.) Due process does not require, however, that a quorum of the decision-making board must personally hear all the evidence in order for an administrative determination to be valid. (*Homefinders, Inc. v. City of*

Evanston (1976), 65 Ill.2d 115, 357 N.E.2d 785.) The requirements of due process are met if the administrative agency considers the evidence contained in the transcript of the proceedings and bases its decision thereon. (*Homefinders, Inc. v. City of Evanston.*) In *Bruns v. Department of Registration & Education* (1978), 59 Ill. App.3d 872, 376 N.E.2d 82, only one board member was present during a medical license revocation proceeding. Nevertheless, the court held that a quorum of board members is not required to be present at an evidentiary hearing and that procedural due process is satisfied where the Board reviews the transcript of proceedings before making its findings and recommendation. Similarly, an absence of a quorum at times while testimony was being taken in the present case did not deprive plaintiff of due process.

Plaintiff urges, however, that individual board members did not review the transcript of proceedings but relied upon an abstract prepared by one board member. This argument would have validity but it finds no support in the record. Minutes of a Board meeting referred to a proposal that the Board members assigned to a case be required to prepare an abstract of the most significant testimony. That same proposal required each Board member to read the entire transcript. During his argument for rehearing, plaintiff's trial counsel stated that he had talked to one Board member who said, at that time, he had not read the transcript. Aside from the clearly improper nature of such an alleged conversation, plaintiff has not suggested any time or place of such a conversation. Nor does he allege that the purported conversation occurred after the Board's recommendations were made. Plaintiff's assertion of impropriety on the part of a Board member is insufficient to raise a legitimate due process argument.

Plaintiff also argues that his rights secured by the fifth amendment were violated because a sanction or penalty was imposed upon him for his failure to testify.

In *Spevack* v. *Klein* (1967), 385 U.S. 511, the United States Supreme Court held that an attorney could not be disbarred merely because he refused to produce demanded documents or to testify at the judicial inquiry. Our supreme court, in *In re March* (1978), 71 Ill.2d 382, 376 N.E.2d 213, held that an attorney in a disciplinary hearing may be compelled to testify if he is granted immunity from the use of such testimony at subsequent criminal proceedings and is so informed at the disciplinary hearing.

Plaintiff here was not compelled to testify at the hearings before the Board. He complains, however, that various remarks made by several Board members and the Department's counsel regarding his failure to testify were prejudicial and constituted an impermissible "cost" exacted for the exercise of his fifth amendment privilege. At one hearing, a Board member stated that the Board would be "very pleased" if plaintiff would testify, and upon his refusal, commented that the Board would take into consideration that he refused to testify. Another member pleaded with plaintiff to say "something." At a subsequent hearing, another Board member remarked, "[T]he Board was somewhat disappointed that it was necessary for [plaintiff] not to respond to questions, but we respect his right not to do so." Plaintiff further objects to a comment made by the Department's counsel that "[plaintiff] has been unwilling to answer any questions." The latter remark was made in the course of counsel's argument urging the Board to order plaintiff to provide handwriting exemplars. In our review, these

comments are innocuous and do not demonstrate substantial prejudice to plaintiff.

Moreover, unlike the situation presented in *Spevack*, the record does not demonstrate that plaintiff's medical license was revoked because he asserted his privilege against self-incrimination. Nothing in the Board's findings indicates that its final determination was based in part or in whole, upon plaintiff's refusal to testify. We thus conclude that the objectionable comments did not violate plaintiff's rights secured by the fifth amendment.

Plaintiff further contends that he was denied a fair and impartial hearing by the conduct of the Department and its counsel. He first argues that the Department failed to comply with his request for discovery. Plaintiff asserts that he made a request for the production of an electronic surveillance report involving him prior to the hearing. At that time, counsel for the Department stated that no such report existed. During the hearing, counsel tendered the report to plaintiff's attorney and apologized for the oversight.

The purpose of pretrial discovery is to aid the party in the preparation and presentation of his case or defense, and to eliminate surprise as much as possible. (*Wegmann v. Department of Registration & Education* (1978), 61 Ill. App.3d 352, 377 N.E.2d 1297). In an administrative proceeding, an agency is required to disclose evidence in its possession which might be helpful to an accused. *Wegmann* v. *Department of Registration and Education.*

In the present case, plaintiff requested an electronic surveillance report sometime prior to the hearing. It appears, however, that only an authorization for electronic surveillance was granted and that electronic surveillance

was never conducted. While it is true that Department's counsel apparently overlooked a report in his file concerning plaintiff, the record demonstrates that counsel for the Department tendered the report to plaintiff's trial counsel during the proceedings when it was discovered. Moreover, it appears that plaintiff was not prejudiced by the delay. The Department did not use the report in the presentation of its case and, upon receiving it, plaintiff's counsel made no further reference to it.

Plaintiff also complains, without any justification, that he was treated unfairly because the counsel for the Department did not send all the prescriptions to the F.B.I. for analysis by a handwriting expert. Senter testified that he examined 5,944 out of the 7,000 prescriptions. He did not state that all of the prescriptions were not delivered to him, but explained that time constraints did not permit him to examine the remaining prescriptions.

We also hold that the trial court applied the proper standard for administrative review. In rendering his decision, the judge stated that a court should not disturb administrative findings unless they are arbitrary or constitute an abuse of discretion. He further pointed out that what the Board lacked in legal sophistication, it made up for in medical knowledge, which equipped it to assess credibility of conflicting medical testimony.

The findings and conclusions of the administrative agency on questions of fact are to be held prima facie true and correct. (Ill. Rev. Stat. 1977, ch. 110, par. 274.) It is not the function of the reviewing court to reweigh the evidence or make independent determinations of fact. (*General Electric Co.* v. *Illinois Fair Employment Practices Com.* (1976), 38 Ill. App.3d 967, 349 N.E.2d 553.) In reviewing an agency's action, the court must decide whether

the agency's determination is against the manifest weight of the evidence. (*Unger* v. *Sirena Division of Consolidated Foods, Corp.* (1978), 60 Ill. App.3d 840, 377 N.E.2d 266.) For a judgment to be against the manifest weight of the evidence, it must appear that conclusions opposite to those reached by the agency are clearly evident. *Mobley* v. *Conlisk* (1978), 59 Ill. App.3d 1031, 376 N.E.2d 247.

The Board in the present case made two findings against plaintiff: that his method of prescribing controlled substances constituted an unethical practice of medicine harmful to the public in violation of section 16(4) of the Medical Practice Act; and that plaintiff issued medical prescriptions for controlled substances for other than therapeutic purposes in violation of section 16(19) of the Act. Both findings were supported by substantial evidence.

Plaintiff claims that the Department failed to establish a proper foundation for the prescriptions because it failed to produce the original subpoena on the pharmacies and the party serving the subpoena did not testify. The Department, however, presented evidence that all of the 7,208 prescriptions for controlled substances during the brief period in question contained plaintiff's name, address and BND number. Approximately half of that number of prescriptions were on serially numbered triplicate forms which had been requested by and sent to plaintiff. And while plaintiff occasionally complained to the State about delay in receiving these forms, he never reported any forms as lost or stolen. Additionally, a handwriting expert testified that the signatures on the prescriptions were within plaintiff's writing ability. The Department established by overwhelming circumstantial evidence that plaintiff issued the prescriptions. The resultant determination by the Board that the issuance of such a vast

number of prescriptions for controlled substances in a short period of time constituted an unethical practice of medicine was not contrary to the manifest weight of the evidence.

As to the second finding, the Department established by the expert testimony of Dr. Thornton that there was no therapeutic purpose for the prescriptions issued by plaintiff. While minor contradictions and discrepancies appear in his testimony under a thorough cross-examination, the Board's reliance on his expert testimony was not obviously wrong. The Board's decision that plaintiff issued medical prescriptions for controlled substances for other than therapeutic purposes is not contrary to the manifest weight of the evidence.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

SIMON and RIZZI, J.J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
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March 30, 1981

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No. 54436 — Dr. Gerald E. McCabe, petitioner, vs. Department of Registration and Education of the State of Illinois, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause. Mr. Justice Simon took no part.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court